



THE ATTORNEY GENERAL OF TEXAS

AUSTIN 11, TEXAS

PRICE DANIEL
ATTORNEY GENERAL

December 16, 1947

Hon. John H. Winters
Executive Director
Department of Public Welfare
Austin, Texas

Opinion No. V-456

Re: Facts to be taken
into consideration
in passing on an
application for
Old Age Assistance
in the given case

Dear Sir:

W. B. Biggs died testate, leaving certain property to his two sisters and mentioning Chas. H. Biggs, the applicant for Old Age Assistance. Subsequently the sisters died intestate. Out of these facts arise the following questions propounded by you:

"1. Does the provision in the will requiring the sisters to support and maintain the applicant for the remainder of his life constitute a lien against the property to such an extent that the corpus of the estate can be used for the maintenance of the applicant?

"2. In view of the fact that the estate would eventually be depleted if any portion of it were sold, can the heirs, under the terms of the will, sell any portion of the corpus of the estate and use the proceeds for our applicant's maintenance?

"3. If, under the terms of the will, they might sell the corpus of the estate for his maintenance, but are unwilling to do so, could the department

consider this as a potential available resource for meeting the needs of our applicant?"

We note from a copy of the will which accompanied your request that the second through the fifth items provide for the distribution of the testator's property, both real and personal. The principal beneficiaries were the two sisters of the testator. The sixth provision of the will is as follows:

"SIXTH. The properties here in willed to my two sisters, Mrs. M. S. Montgomery and Mrs. Sallie E. Henry are so willed with the understanding and agreement on their part, that they will jointly take care of my brother Chas. H. Biggs during his lifetime, provide him a home and the necessities of life."

Your first two questions relate to the nature of the interest which may have been created in behalf of Chas. H. Biggs. In view of our answer to your third question which follows, we do not find it necessary to answer questions one and two.

Art. 695c, Sec. 20, V.A.C.S., provides, in part, as follows:

"Sec. 20. Old Age Assistance shall be given under the provisions of this Act to any needy person;

"

"(5) Who has not sufficient income or other resources to provide a reasonable subsistence compatible with health and decency. Provided that in consideration of income and resources actually available to the applicant the State agency shall not evaluate income and resources which may be available only to the relatives of the applicant. Income and resources to be taken into consideration shall be known to exist and shall be available to the applicant. An applicant for Old Age Assistance shall not

be denied assistance because of the existence of a child or other relative, except husband or wife, who is able to contribute to the applicant's support, and no inquiry shall be made into the financial ability of said child or other relative, except husband or wife, in determining the applicant's eligibility. The applicant's child or other relative, except or husband or wife, is to be treated by the State Department in the same way as any person not related to the applicant; any aid or contribution to the applicant from such child or other relative, except husband or wife, must actually exist in fact, or with reasonable certainty, be available in the future to constitute a resource to the applicant." (Emphasis added)

The reading of certain cases would indicate that a trust or lien was created by the will in favor of the claimant. *Busby v. Lynn*, 37 Tex. 146; *Godard v. Godard*, 197 S.W. (2d) 554; *Low v. Ramsey*, 122 S.W. 167. On the other hand, other cases indicate that no trust or lien was created. *Brannon v. Morgan*, 106 S.W. (2d) 841; *Derragh v. Barmore*, 242 S.W. 714.

If the holders of the property are failing and refusing to furnish maintenance and support for the claimant a difficult lawsuit will be required to determine the correctness of such action. Under such circumstances, we do not believe the aid to the claimant exists or is "available" with reasonable certainty.

The expressed intention of the Legislature was to restrict the Department of Public Welfare to a consideration of resources actually available or reasonably certain. Assuming, but not deciding, that the applicant does have a lien on the property in question, it is certainly a rather tenuous claim, and could not be considered an existent source of support.

It would be contrary to the general spirit of the Old Age Assistance statute to enlarge the quoted provision so as to include money or property not actually received but that which potentially might be received.

Therefore, you are respectfully advised that the Department of Public Welfare should not take into

consideration any interest which Chas. H. Biggs may have received under the will of his brother in passing on the applicant's qualifications for assistance.

SUMMARY

Under Art. 695c, Sec. 20 (5), V.C.S., the Department of Public Welfare should not consider any potential resource of an applicant for Old Age Assistance which has not been actually received or is not a reasonably certain available source of support.

Yours very truly

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